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The subject of "government by injunction," as it is popularly called, has met with considerable agitation of late, both within the profession and in the daily press. It had its origin in the action of certain of the lower federal courts which undertook to compel obedience to the criminal laws on the part of combinations of individuals, by means of mandatory process. So far as we know the doctrine, as broadly stated by those who criticize it as a usurpation of judical authority, has in no case been affirmed by the highest court of the land. In two recent cases, however, which have attracted wide attention, the subject has been discussed by the United States Supreme Court, and the extent and limit of the doctrine defined. These cases are Harkrader v. Wadley, 19 S. C. Rep. 119, and Fitts v. McGhee, 19 S. C. Rep. 269, the latter case affirming the view and conclusion in the former. In that case it appeared that the legislature of Alabama passed an act fixing the maximum rate of toll on a bridge over the Tennessee river at Florence, owned by a railroad company, and prescribing a penalty for violations of the act. Believing the act to be unconstitutional, the receiver of the railroad company ordered the tollgate keepers to disregard it; it was so disregarded, and numerous criminal prosecutions were instituted in the State court against the tollgate keepers for violations of the act. Thereupon the receiver filed a bill in the federal court, and an injunction was promptly issued against the governor of the State, the attorney-general, "and all persons whomsoever," prohibiting them from instituting or prosecuting any proceedings under the said act. The plaintiff even had the assurance to issue a subpœna against the State itself, and to serve it upon the governor. The Supreme Court of the United States very properly condemned the issuing of an injunction in such a case, and laid down the propositions of law, that a federal court has no jurisdiction to grant an injunction to restrain a prosecuting attorney of a State from prosecuting an indictment regularly found under a State statute, conceded to be valid, and that an injunction in such a case would be virtually one against the State itself. In the course of the argument in Fitts v. McGhee, Mr. Justice Harlan used the following language: "Upon examination it will be found that the defendants in each of those cases were officers of the State, specially charged with the execution of a State enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing, or were about to commit, some specific wrong or trespass to the injury of the plaintiffs' rights. There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the State officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney-general, based upon the theory that the former, as the executive of the State, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney-general, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespasses or wrongs. Under the view we take of the question, the citizen is not without effective remedy, when proceeded against under a legislative enact-

ment void for repugnancy to the supreme law of the land; for, whatever the form of proceeding against him, he can make his defense upon the ground that the statute is unconstitutional and void. And that question can be ultimately brought to this court for final determination."

The *New York Law Journal*, commenting upon these decisions, very properly says that "certain of the notices in the press have strayed considerably beyond the mark in attempting to classify the effect of these decisions. It has been said by some critics that they will afford a salutary check to the increasing, pernicious tendency toward 'government by injunction.' We have on previous occasions denied that there was any justification, even by implication, for the use of the phrase above quoted. We do not believe, that from any decision that has been upheld by the Supreme Court of the United States, it can legitimately be claimed that positive executive or governmental functions have been usurped by the federal courts. The granting of the injunctions appealed from in these two recent decisions was exceptional, and the attempted usurpation was very properly and very promptly frowned upon by our federal court of last resort. Some of our contemporaries have gone too far in the inferences drawn as to the absolute power, or lack of power, of federal courts to interfere with State criminal prosecutions by *habeas corpus*."

NOTES OF IMPORTANT DECISIONS.

CORPORATIONS — CONTRACTS—RATIFICATION —NOTICE.—In Balfour v. Fresno Canal & Irrigation Co., 55 Pac. Rep. 1062, decided by the Supreme Court of California, it was held that where a corporation ratifies a contract made by its president without authority, it is bound by any declaration he may have made during the negotiation determining the meaning of an ambiguity, since it is presumed to have notice of all the facts relating to the negotiation. The court said in part: "It is admitted that the corporation ratified the contract made, but it is contended that the power was vested entirely in the directors, and all that they ratified was the written contract, and they cannot be held to any other construction than that which would be given the language unaided by those unauthorized conversations. The corporation accepted the contract as written, and can be bound only by its terms. It knew of no conversations which might give a different effect to the contract than the obvious purport of its language. This proposition cannot be maintained. When the corporation ratified and adopted the contract made for it by its president it took it *cum onere*. The ratification itself affords conclusive proof that the president had authority to negotiate such contracts for the corporation. If no previous authorization existed, the ratification is the equivalent of a previous authorization. If the corporation ratified without adequate knowledge of the facts, or if unauthorized representations were made without the knowledge of the principal, it might, under some circumstances, refuse to be bound by the contract, and seek a rescission; but it cannot insist upon its contract rights, and repudiate the unauthorized representations of the agent, which, to some extent, constituted the inducement to make the contract on the part of the other. Gribble v. Brewing Co., 100 Cal. 71, 34 Pac. Rep. 527; Mundorff v. Wickersham, 63 Pa. St. 87; Bennett v. Judson, 21 N. Y. 238. In these cases numerous authorities are cited to the same effect. The rule that the principal will not be held to a ratification unless he act with full knowledge of all the facts has no application here, for the principal is insisting upon the contract. But, if full knowledge was necessary, it must be presumed that the corporation had full notice of all the facts which were known to its president. The president of a corporation is a proper person to whom notice, which is to affect a corporation, is to be given. The corporation has no eyes, ears, or understanding save through its agents. The president is considered the head of the corporation, and it is his duty to report to the trustees information affecting the interests of the corporation. And the presumption is that he does so. Usually this is a conclusive presumption. Thomp. Corp. sec. 5228."

INSURANCE — MEASURE OF DAMAGES—CONSTITUTIONAL LAW.—A statute of Missouri provided that in case of loss the company should not be permitted to deny that the insured property was worth at the time the amount of the insurance, and in case of total loss such amount, less any depreciation, should be the measure of damages. It was held by the Supreme Court of the United States in Orient Ins. Co. v. Daggs, that the statute did not violate the constitution of the United States by abridging the privileges of citizens, or denying equal protection of the laws, or depriving of property without due process of law; that the insurer has no such constitutional right to limit its liability to actual damages as would render such a statute void; that the statute does not convert the contract into a wager policy, but from an open to a valued policy. The freedom to determine the amount that shall be insured is not abridged, and that the statute does not regulate contracts made or rights acquired prior to its en-

actment. Mr. Justice McKenna who delivered the opinion says: "The statute of Missouri is alleged to violate the fourteenth amendment of the constitution of the United States in the following particulars: (1) That it abridges the privileges or immunities of citizens of the United States; (2) denies to persons within its jurisdiction the equal protection of the laws; and (3) deprives persons of property without due process of law.

"(1) It is not clear that this ground is relied on. It is, however, not available to plaintiff in error. A corporation is not a citizen within the meaning of the provision, and hence has not 'privileges and immunities' secured to 'citizens' against State legislation. This was decided in Paul v. Virginia, 8 Wall. 168, against a corporation upon which were imposed conditions for doing business in the State of Virginia, and has been repeated in many cases since, including one at the present term. Blake v. McClung, *ante*, page —.

"(2) It is not easy to make a succinct statement of the objections of plaintiff in error under this provision. Counsel says: 'The business of insurance includes insurance against damages on account of death, accident, personal injury, liability for acts of employees, damages to plate glass, damages by hail, lightning, high winds, tornadoes, and against damages to personal property on account of fire or casualty by other elements, as well as insurance against loss or damage to buildings on account of fire. * * * No other business is subject to the discrimination in case such business is involved in litigation, of having the damages assessed without due process of law. The statute singles out persons engaged in fire insurance as against all other kinds of insurance, and as against all other kinds of business, and imposes the onerous and unusual conditions provided in the statute against such persons.' And again: 'The statute thus discriminates as to the subject-matter as to the parties, as to the mode of trial of actions at law and equity, and imposes upon this particular class of underwriters, as distinguished from all the rest of the world, conditions which abrogate its contracts, compels it to pay damages never sustained, and prevents it from having an investigation upon the trial by due process of law.'

"This mingles grounds of objection, and confounds the prohibitions of the provision we are considering with that of the next provision. Whether the statute of Missouri provides for 'due process' we shall consider hereafter, and upon that consideration determine how much of the complaint against it in that regard is true. Now we may confine ourselves to the more specific contention that it discriminates between fire insurance corporations or companies and those engaged in other kinds of insurance.

"It is not necessary to state the reasoning upon which classification by legislation is based or justified. This court has had many occasions to do so, and only lately reviewed the subject in Magoun v. Illinois Trust and Savings Bank, 170 U. S. 283. We said in that case that 'the State may distinguish, select, and classify objects of legislation, and necessarily the power must have a wide range of discretion.' And this because of the functions of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons, or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary. The classification of the Missouri statute is certainly not arbitrary. We see many differences between fire insurance and other insurance, both to the insurer and the insured — differences in the elements insured against and the possible relation of the parties to them, producing consequences which may justify, if not demand different legislative treatment. Of course it is not for us to debate the policy of any particular treatment, and the freedom of discretion which we have said the State has is exhibited by analogous, if not exact examples to the Missouri statute in Railway Company v. Mackey, 127 U. S. 204, and in Minneapolis Railway v. Beckwith, 129 U. S. 26.

"In Railway Company v. Mackey, 127 U. S. 204, a law of Kansas was passed which abrogated as to railroads the rule of the common law exempting masters from liability to one servant for the negligence of another. It was sustained as a valid classification, notwithstanding that it did not apply to other carriers, or even to other corporations using steam. The law was objected to, as the statute of Missouri is objected to on the ground that it violated the provisions of the constitution which we are now considering.

"To the first contention the court, by Mr. Justice Field, said: 'The plain answer to this contention is, that the liability imposed by the law of 1874 arises only for injuries subsequently committed; it has no application to past injuries, and it cannot be successfully contented that the State may not prescribe the liabilities under whith corporations created by laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every State.' And after further comment added: 'That its passage was within the competency of the legislature, we have no doubt.' To the second contention it was said: 'It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be farther from the fact.' The legislation was justified by the character of the business of railroad companies, and it was declared to be a matter of legislative discretion whether the same liability should or should not be applied to other carriers, or to persons and corporations using steam in manufactures.

"In Minneapolis Railway Company v. Beckwith, 129 U. S. 26, a law of Iowa making a class of railway corporations for special legislation was sustained.

"(3) What it is for a State to deprive a person of life, liberty or property without due process of law' is not much nearer to precise definition today than it was said to be by Mr. Justice Miller, in Davidson v. New Orleans, 96 U. S. 97.

"The process 'of judicial inclusion and exclusion' has proceeded, and yet this court in Holden v. Hardy, 169 U. S. 369, again declined specific definition. Mr. Justice Brown, speaking for the court, said: 'This court has never attempted to define with precision the words 'due process of law' nor is it necessary in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his own defense.' These principles were extended to the right to acquire property and to enter into contracts with respect to property, but it was said 'this right of contracts, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers.'

"The legislation sustained was an act of the State of Utah making the employment of workingmen in all underground mines and workings, and in smelters and all other institutions for the reduction and refining of ores or metals eight hours per day, except in cases of emergency, where life or property should be in imminent danger. The violation of the statute was made a misdemeanor. It was undoubtedly a limitation on the right of contract—that of the employer and that of the employed — enforced by a criminal prosecution and penalty on the former and on his agents and managers. It was held a valid exercise of the police power of the State. These powers were not defined except by illustration, nor need we now define them. The case is a precedent to support the validity of the Missouri statute now under consideration.

"The statute provides as follows: 'In all suits brought upon policies of insurance against loss or damage by fire, hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property; and in case of total loss of the property insured, the measure of damages shall be the amount for which the same was insured, less whatever depreciation in value below the amount for which the property is insured the property may have sustained between the time of issuing the policy and the time of the loss, and the burden of proving such depreciation shall be upon the defendant.' * * * It is also provided that no condition in any policy of insurance contrary to such provisions shall be legal or valid.

"The specific objections which, it is claimed, bring the statute within the prohibition of the constitution, in the last analysis, may be reduced to the following: That the statute takes away a fundamental right and precludes a judicial inquiry of liability on policies of fire insurance by a conclusive presumption of fact.

"The right claimed is to make contracts of insurance. The essence of these, it is said, is indemnity, and that the statute converts them into wager policies—into contracts (to quote counsel) having for their basis speculation and profit, 'contrary to the course of the common law.' The statement is broad, and counsel in making it ignores many things. The statute tends to assure, not to detract from the indemnity of the contracts, and if elements of chance or speculation intrude, it will be on account of carelessness or fraud. It is admitted that the effect of the statute is to make valued policies of those issued; and the conclusive effect which has been ascribed to their valuation has never been condemned as making them wager policies or as introducing elements of speculation into them.

"The statute, then, does not present the alternative of wager policies to indemnity policies. The change is from one kind of indemnity policy to another kind, from open policies to valued policies, both of which are sanctioned by the practice and law of insurance, and this change is the only compulsion of the law. It makes no contract for the parties. In this it permits absolute freedom. It leaves them to fix the valuation of the property upon such prudence and inquiry as they choose. It only ascribes estoppel after this is done—estoppel, it must be observed, to the acts of the parties, and only to their acts in open and honest dealing. Its presumptions cannot be urged against fraud, and it permits the subsequent depreciation of the property to be shown.

"We see no risk to insurance companies in this statute. How can it come? Not from fraud and not from change, because, as we have seen, the presumptions of the statute do not obtain against fraud or change in the valuation of the property. Risk then can only come from the failure to observe care—that care which it might be supposed, without any prompting from the law, underwriters would observe, and which if observed would make their policies true contracts of insurance, not seemingly so, but really so; not only when premiums are paying, but when loss is to be paid. The State surely has the power to determine that this result is desirable, and to accomplish it even by a limitation of the right of contract claimed by plaintiff in error.

"It would be idle and trite to say that no right is absolute. *Sic utere tuo ut alienum non loedas* is universal and prevading obligation. It is a condition upon which all property is held. Its application to particular conditions must necessarily be within the reasonable discretion of the legislative power. When such discretion is exercised in a given case by means appropriate and which are reasonable, not oppressive or discriminatory, it is not subject to constitutional objection. The Missouri statute comes within this rule.

"The cases cited by plaintiff in error, which hold that the legislature may give the effect of *prima facie* proof to certain acts, but not conclusive proof, do not apply. They were not of contract nor gave effect to contracts. It is one thing to attribute effect to the convention of parties entered into under the admonition of the law, and another thing to give to circumstances, maybe accidental, conclusive presumption, and proof to establish and force a result against property or liberty."

THE DOCTRINE OF ULTRA VIRES, AS AFFECTING THE RIGHTS AND OBLIGATIONS OF A CORPORATION UNDER A CONTRACT TO WHICH IT IS A PARTY, WHEN THE CONTRACT HAS BEEN EXECUTED BY ONE PARTY BUT IS EXECUTORY AS TO THE OTHER.

A striking feature of modern commercial activity is the growth of the "corporate idea." So rapidly have corporations increased in the last fifty years that they threaten soon to absorb all the business interests of the country. It has thus become important to determine just what can be done by them, and what their limitations may be. Hence the doctrine of *ultra vires*—the theory that the State, while giving life to these creatures, has limited their rights and powers. Municipal corporations will not be here considered. Again, the term *ultra vires*, as applied to the contracts of corporations, has many meanings;[1] but this paper will treat only of those contracts, which are beyond the scope of a corporation's chartered powers, *i. e.*, not within the objects for which the corporation was created, but not inherently illegal nor immoral. A contract, in truth *ultra vires*, is beyond the power of any corporate agent to make, or of the corporation itself to ratify when made; but is one, which would be valid if made by any individual.[2] Thus modified the subject becomes: What are the rights and obligations of a private corporation under a contract (*ultra vires* because beyond the chartered powers, but not in itself illegal) to which it is a party, where the contract has been executed by one party but is executory as to the other? The first inquiry is as to the true reason for the doctrine of *ultra vires*. Next must be shown the contrary views thereof taken by various courts, with the reasons for thinking one more nearly correct than another; and, finally, the effect of the application of these views to the case in hand must be determined. At common law a corporation could bind itself to do anything to which a natural person could bind himself, and deal with its property as a natural person might deal with his own.[3] The doctrine, then, is purely of judicial origin.[4] In England it seems well settled that it is founded on public policy.[5] In the famous Bissell case, Judge Comstock, in an able argument endeavored to show that *ultra vires* contracts, in themselves lawful, violate no rule of public policy.[6] His views, rather than the opposing ones of Judge Selden in the same case, seem to have found favor in New York and with law writers.[7] Nevertheless, Judge Selden was right—*ultra vires* contracts do violate public policy.[8] "There is nothing of mystery in the use of the words of a dead language—*ultra vires*. * * * An illegal act of an individual is as really *ultra vires* as the unauthorized act of a corporation."[9] A corporation has the power to do an unauthorized act, but not the right, just as an individual, having the power to commit crime, has no right to become a criminal. In either case the act is contrary to public policy, and in either case a contract to do such an act should be held void and unenforceable. Individuals, engaged in business, have no greater privileges than other citizens; their whole fortunes (even their personal abilities, for their future earnings are sometimes due their creditors) are liable for their obligations. But as corporators these individuals acquire peculiar privileges and widened powers. Long time is assured them in which to perfect their plans, and (except in the case of a few corporations) their private fortunes are secure from loss, no matter how reckless their efforts or wild their designs. It thus becomes of the highest consequence to the public that these designs be confined and pointed out in the corporate

[1] 27 A. & E. Ency. of Law, 352 (1st Ed.).
[2] Comstock, J., in Bissell v. R. R. Co., 22 N. Y. 258.
[3] Blackburn, J., in Ashbury Co. v. Riche, L. R. 9 Ex. 263.
[4] Green's Brice's Ultra Vires (2d Ed.), p IX.
[5] Beach, Priv. Corp. sec. 421; Colman v. E. C. Ry. Co., 10 Beav. 1, p. 14; MacGregor v. Ry. Co., 18 Q. B. R., at p. 631, cited in Greenhood on Pub. Pol., p. 556; Ashbury Co. v. Riche, L. R. 7 H. L., at p. 673, followed by Wenlock v. River Dee Co., 10 App. Cas. 354.
[6] Bissell v. Railroad Co., 22 N. Y., at p. 269.
[7] Whitney Arms Co. v. Barlow, 63 N. Y. 62; Leslie v. Lorillard, 110 N. Y. 519, 28 Am. Law Rev. 223, 376.
[8] Lucas v. Transfer Co., 70 Iowa, at pp. 545-6; Miller v. Ins. Co. (Tenn.), 21 S. W. Rep. 39.
[9] Pemberton Bank v. Porter, 125 Mass., at p. 335.

charters. For the public invests in, and gives credit to, corporations on the faith of the charters, the provisions of which are for the benefit, not alone of the shareholders for the time being, but of all who may in future become shareholders and creditors.[10] "The clear result of the decisions may be summed up thus: The charter of a corporation is the measure of its powers. All contracts made by a corporation beyond the scope of its powers are unlawful and void, and no action can be maintained upon them in the courts, upon three distinct grounds: the obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred on it by law."[11] All these reasons may be reduced to one—public policy, and, therefore, *ultra vires* contracts are illegal and unenforceable.[12] So long as the contract remains wholly executory all the courts seem to agree to this.[13] But when the contract has been executed by one party, but is executory as to the other, the courts are in conflict. On the one hand is the New York rule, that in such case the defense of *ultra vires* is not to be allowed;[14] on the other, the United States rule, that the defense is good, but the party setting it up must return any benefit received under the contract.[15] The New York rule is founded on estoppel.[16] In order that estoppel may arise there must be: first, a false representation by the party to be estopped; second, knowledge of the falsity of his representation, or carelessness, whether it be true or false; third, intent to induce action by the other party; fourth, ignorance of the truth on the part of the other party; fifth, action upon the representation by the other party.[17] In determining whether or not these elements are present, it is necessary to keep clearly in mind the two-fold division of the class of *ultra vires* contracts here discussed—those, which are not at all within the scope of the charter (as a subscription toward the expense of a musical festival by a railroad company), and those which are *ultra vires* because of circumstances outside the contract, as where a corporation, already in debt to the limit fixed by its charter, seeks a new loan for an amount within that limit, and hence valid but for the previous borrowing.[18] In the first class the fourth element of estoppel is wanting, both parties being presumed to know the limitations imposed by the charter.[19] In the second class the other party may be entirely ignorant that the corporation, before contracting with him, has reached the limit of its powers, nor can he be presumed to be acquainted with all the acts of the corporation. He contracts strictly within the charter so far as he can know, and hence the corporation may here be estopped.[20] But it is hard to see why the other party should be estopped, if he ever discovers the *ultra vires* character of his contract, and wishes to defend on that ground, for not only the charter, but the extrinsic facts, must be known to the corporation. Here, then, is one objection to the New York rule—it logically applies to but one party, the corporation, in one only of the two classes of *ultra vires* contracts. Another objection is, that this rule treats corporations as persons, and not as—what they really are[21]—the embodiment of legal relations between the State and the various classes of individuals whose rights must be considered in cases involving *ultra vires* contracts. So far as the sovereignty of the State is affected, it can best be guarded by direct proceedings against

[10] See Ashbury Co. v. Riche, L. R. 7 H. L., at p. 684.

[11] Cent. T. Co. v. Pullman Co., 139 U. S., at p. 48.

[12] St. L., V. & T. H. R. R. Co. v. T. H. & I. R. R., 145 U. S. 393.

[13] Bosshardt & Wilson Co. v. Oil Co., 171 Pa. 109; Nassau Bank v. Jones, 95 N. Y. 115; Nims v. School Trustees, 160 Mass., at p. 179; Taylor on Corp., sec. 276, n. 2, on p. 237.

[14] Bissell v. R. R. Co., 22 N. Y. 258; Bradley v. Ballard, 55 Ill. 413.

[15] Cent. T. Co. v. Pullman Co., 139 U. S. 24. In England it seems that even the benefits received under the contract may be retained. Ashbury Co. v. Riche, L. R. 7 H. L. 653; Wenlock v. River Dee Co., 10 App. Cas. 354. And so it is in Alabama: Chewacla, etc. Co. v. Dismukes, 87 Ala. 344.

[16] Notes 13, 14 and 15.

[17] Bispham's Equity, sec. 282, n. 2.

[18] Division noted in Miner's Co. v. Zellerbach, 37 Cal., at p. 578.

[19] Ry. Co. v. Bridge Co., 131 U. S. at p. 389; Hood v. R. R., 22 Conn., at pp. 507 8.

[20] Green's Brice's Ultra Vires, 729, n. E. C. Ry. Co. v. Hawkes, 5 H. L. C. 331. But if the other party by his own contract exceeds the charter, then there is no estoppel, for he knows the facts which make his contract *ultra vires*. See Wenlock v. River Dee Co., 10 App. Cas. 354, where a corporation, authorized to borrow 25,000 pounds, borrowed of Lord Wenlock 153,000 pounds. His estate recovered only the 25,000 pounds, and some of the rest on another ground.

[21] Taylor on Corp., ch. 3.

the corporation, and hence need not be here discussed. So far as the State is concerned to protect the public, its interests are practically identical with those of the various classes interested in the corporate action. These are, first, the shareholders at the time of making the *ultra vires* contract; second, the future shareholders or investors; third, the creditors. The competitors of the corporation in the field, into which *ultra vires* acts take it, are also interested in restraining such acts. If that field—insurance, for instance—can be lawfully entered only by corporations under certain restrictions, those already there have the right to demand that others, organized under less burdensome laws, shall not be aided by judicial construction to invade their domain.[22] Of course they are theoretically protected by the State through its power to forfeit the charter of the offenders. Yet courts should remember how proverbially slow to act is the State, and protect this class from unfair competition. Manifestly, these classes should not be bound, *i. e.*, the corporation should not be bound where their rights are affected by *ultra vires* contracts, unless they have estopped themselves. Consider, first, the shareholders at the time of making the *ultra vires* contract. Under the New York rule they are estopped, because they are supposed to impliedly assent to all the acts of the corporate officers, which they do not repudiate before the other contracting party has performed. But modern corporation shareholders cannot learn of such contracts in time to repudiate. They are not present at the making of the contract. The other party is, and can easily determine whether his contract is *ultra vires*. So easily that "the idea of imposition on the public (in permitting the defense of *ultra vires*) is incredible and preposterous."[23] It is absurd to estop the shareholders of a great corporation on the theory of implied assent. They are scattered all over the world (during the Santa Fe reorganization offices were opened in Amsterdam and London, as well as in America), some are minors, some lunatics, some persons holding the stock under orders from courts, none of whom could possibly be estopped. If shareholders could be brought before the court individually, estoppel might justly be applied to some of them. But the corporation alone appears in court, representing all alike, and in binding one all are bound. It may seem harsh toward the other party to absolve the corporation from performance, but it is much harsher to benefit that party, who violated a charter he might have known, at the expense of innocent shareholders, who, relying upon the limitations of the charter, invested in the corporation. Shall courts permit that investment to be squandered at the whim of directors or unscrupulous contractors? They already have power enough to wreck corporations without this in addition. The same reasoning applies to those who become shareholders after the *ultra vires* contract has been made. Unless, after learning the facts, they acquiesce in the unlawful contract, they should not be estopped, but the corporation should be permitted this defense, so that the investing public may feel safe in trusting funds to corporations, and not suffer because of contracts beyond the chartered powers. The New York rule compels every purchaser of shares to investigate every contract of the corporation, if he would know in what lines of business his money will be used. The creditors, the third interested class, have even stronger rights. Argument is unnecessary to show that a creditor under an *intra vires* contract occupies a stronger position than one who has merely performed his side of an *ultra vires* contract.[24] His rights are paramount, and should not be defeated by another's unlawful contract, as often may happen under the New York rule. This rule was stated in Whitney Arms Co. v. Barlow, 63 N. Y. 62, at p. 70, by Allen, J., in these words: "A corporation cannot set up the defense when the other party has performed. The same rule holds *e converso*." On the authority and reasoning of this case and the Bissell case this seems settled as the New York rule.[25] To sustain his proposition, the judge cites four

[22] Ashbury Co. v. Riche, L. R. 7 H. L., at p. 691: corporate privileges must be exercised in strict conformity to the charter, as otherwise corporators would have rights without the corresponding burdens intended to be imposed by law.

[23] Hood v. R. R., 22 Conn. 502.

[24] First Nat. Bk. v. Keefer Co. (Ky.), 23 S. W. Rep. 675; Bk. of Chat. v. Memphis Bk., 9 Heisk. 408, *dictum*; Cole v. M. I. Co., 133 N. Y. 164, where the court carefully avoided any reference to *ultra vires* and decided on other grounds.

[25] Diamond Match Co. v. Roeber, 106 N. Y., at p. 487; Starin v. Edson, 112 N. Y., at p. 215.

English cases.[26] In the first, there was no corporation, but a joint stock company, treated by the court as a partnership. The second case falls within the second class of *ultra vires* contracts before referred to. The third is squarely contrary, for a loan of £1,300, the corporation having no authority to borrow any amount, was held not to be a debt of the corporation. In the fourth the contract was not *ultra vires* in the sense here used, but simply lacked the corporate seal. Of course it was held valid.[27] There was also cited a case where the action was in tort,[28] and two cases in which the contracts were not *ultra vires*.[29] One cited case outside New York, and one only, does sustain the rule.[30] The argument of the judge is that the State has no interest in arresting corporate action on an *ultra vires* contract, while the shareholders have a direct interest in reclaiming and restoring to proper custody the diverted funds.[31] It has been shown that the public is highly interested in restraining *ultra vires* contracts, and, while the shareholders have the right to reclaim their funds, the right may be exercised in a better way than by an action on the contract itself. Even in New York there are some cases in which the rule has not been strictly applied. In one case the plaintiffs were cotton brokers, and bought cotton for the defendant corporation —transactions clearly *ultra vires*. A loss accruing, the corporation refused to pay. The defense, *ultra vires*, prevailed, the court distinguishing the case from Whitney Arms Co. v. Barlow on the ground that, as the cotton had not been delivered, the contract was still executory.[32] The distinction is plain, but its application to this case draws a line too fine to be seen by ordinary mortals, for the cotton was held subject to the defendant's call, which was as full a delivery as either party ever contemplated, and as complete an execution of the contract as is usual in such cases.

[26] *Ex parte* Chippendale, 4 DeG. M & G. 19; *In re* Cork, etc. Ry. Co., 4 Ch. App. 748; *In re* Nat. P. B. Soc., 5 Ch. App. 309; Fishmonger's Co. v. Robertson, 5 Man. & G. 131, miscited 5 McG.

[27] *Contra:* Head v. Ins. Co., 2 Cr. 127.

[28] F. & M. Bank v. D. & M. R. R. Co., 17 Wis. 383.

[29] Chester Glass Co. v. Dewey, 16 Mass. 94; Steamboat Co. v. McCutcheon, 13 Pa. St. 13.

[30] R. & B. R. R. Co. v. Proctor, 29 Vt. 93.

[31] This second part of the argument of course can apply only when the corporation is seeking to enforce the contract.

[32] Jemison v. C. S. Bank, 122 N. Y. 135.

Outside New York, the leading case upholding this rule is Bradley v. Ballard.[33] In this case the rule undoubtedly wrought justice. The plaintiff, as a director of the corporation, participated in the *ultra vires* act, which he sought to have declared invalid, ready to share whatever profits it might bring. It was only justice that he should be compelled to share the loss. Perhaps he might even have been liable to the other contracting party in an action of deceit.[34] But suppose he had been a creditor who contracted with the corporation, believing that the chartered business was safe, and that the corporation would be restrained to that business; or a shareholder who bought his shares, as do thousands every day, knowing nothing of the *ultra vires* act, but confident that the chartered business was a good one for investment; in either case his rights to the corporate property would have been paramount to those of the defendant who violated the law in making the *ultra vires* contract. What is sought is some general rule that will apply in all cases as justly as is possible. The New York rule will not. Founded on estoppel, it applies to one division only of *ultra vires* contracts, and, therefore, as a general rule, it is illogical. In applying it courts must ignore the rights of those who have the best claims to protection, and therefore it is bad.

The rule of the United States courts, as announced by Justice Gray,[35] in substance is, that an *ultra vires* contract, whether executory or executed by one party, is void, and either party can set up *ultra vires* as a perfect defense to any suit on that contract; but the party setting up this defense must restore any property, or money, received under

[33] 55 Ill. 413.

[34] This suggests an idea, which cannot be developed within the limits of this paper, that the parties who commit the fraud should be liable to those whom they injure; *i. e.*, that the corporate officers should be liable in an action of deceit to those with whom they make *ultra vires* contracts. For it is the officers who commit the fraud, and such a rule would not harm the innocent, but would place the liability where it belongs. Of course it would not apply when the corporation had executed and was seeking to enforce the contract. See Bank v. Kitson, 13 Q. B. Div. 360, where this rule was applied, and Insurance Co. v. McClelland, 9 Colo. 11, where it ought to have been. In Holmes v. Willard, 125 N. Y. 75, the court say the officers in such a case might be liable to innocent shareholders—a roundabout way of reaching the same result.

[35] Cent. Trans. Co. v. Pullman P. C. Co., 139 U. S. 24.

the contract. The second part of the rule is merely strong *dictum*, but it is in line with many State authorities,[36] and even with early New York cases.[37] The Central Transportation Company leased all its property to the Pullman Palace Car Company, and sued upon the contract for the rent due thereunder. Recovery was denied, the court saying: "The contract sued on (is) clearly beyond the powers of the plaintiff corporation. * * * It was argued on behalf of the plaintiff that even if the contract was void because of *ultra vires* and against public policy, yet, that having been fully performed by the plaintiff and the benefits received by the defendant, the defendant was estopped to set up the invalidity of the contract as a defense. This argument finds no support in this court.[38] * * * Courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, by permitting property parted with on the faith of the contract to be recovered back, or compensation to be made for it. In such case the action is not maintained on the unlawful contract, but on an implied contract of the defendant to return, or failing to do that, to make compensation for property or money, which it has no right to retain. To maintain such action is not to affirm but to disaffirm the unlawful contract."[39] This is the better rule. Unlike the New York rule, it applies to both classes of *ultra vires* contracts, and enables the court to give their just rights to all parties. No one has the right to profit by *ultra vires* contracts, for such contracts are illegal.[40] Under this rule no profit can be made under the contract itself or by retaining any profit unlawfully received from performance by one party. Of its application no one can complain. The contracting party cannot, for he has no right to expect to profit by such a contract, and he is not defrauded of his property. The shareholders and investors cannot, for they also have no right to profit by *ultra vires* contracts, and their right to have the corporate funds devoted only to chartered purposes is fully protected. Nor can the creditors object. If the corporation has executed, their right is to have the corporate assets made good by restoring the diverted funds to their proper channels. If the other party has executed, they cannot complain that the corporation is not allowed to retain property for which it gave no equivalent, since the return of that property does not diminish the lawful amount of the corporate assets. Further, this rule removes all temptation to make *ultra vires* contracts by making profits under them impossible to both parties. Under the New York rule each party knows that upon execution by one the other will also be bound, and so either party, perceiving a possible benefit to be gained, will hasten to perform. This indicates the answer to the suggestion[41] that the other party should not be permitted the defense of *ultra vires*, although it should be allowed to the corporation. If such were the case corporations would try to make none other than *ultra vires* contracts which they could enforce if profitable and defeat if otherwise. Thus would be encouraged the very evil public policy seeks to prevent—the making of *ultra vires* contracts.

Of course the United States rule will not always work perfect justice,[42] but "the injustice, which may accrue under this rule, is trifling, compared with the importance to the public of keeping corporations within their chartered limits"[43]—an observation, which grows truer every year as corporations go on increasing. But most of the criticism on the rule is unsound, *e. g.*, the Pullman case has been savagely criticised because it permitted the Pullman Company to maintain a robber monopoly.[44] But the Central Transportation Company was in equal fault. Had it recovered, two robbers, instead of one, would have been benefited, and the monopoly would still have existed. And even in the Dis-

[36] Davis v. R. R. Co, 131 Mass. 258; Miller v. Ins. Co. (Tenn.), 21 S. W. Rep. 39; Day v. S. S. Buggy Co., 57 Mich. 146; N. W. Packet Co. v. Shaw, 37 Wis. 655. *Contra:* Chewacla Lime Co. v. Dismukes, 87 Ala. 344. Apparently *contra:* Wenlock v. River Dee Co., 10 App. Cas. 354.

[37] Leavitt v. Palmer, 3 Comstock, 19, p. 37; Selden, J., in Bissell case, 22 N. Y., at p. 304.

[38] P. 55.

[39] P. 60. See C. T. Co. v. P. P. C. Co., 65 Fed. Rep. 158, where, acting on this suggestion, such suit was brought and maintained.

[40] St. L., etc. R. R. v. R. R., 145 U. S. 393.

[41] Taylor on Priv. Corp., ch. VII, Part III, Sec. 277, *et seq.*

[42] Ins. Co. v. McClelland, 9 Colo. 11. Here court admitted that one element of estoppel was wanting, yet denied the defense of *ultra vires*. But justice would have been better served had the defense been permitted and the officers held liable in an action of deceit.

[43] Selden, J., in Bissell case, 22 N. Y., at p. 304.

[44] 28 Am. Law Rev. 376.

mukes case[45] justice would have been done had this rule been fully followed, and Dismukes permitted to recover the value of his property on a *quantum meruit*. If a concurrent rule were established, that corporate officers should be personally liable when they willfully make *ultra vires* contracts, complete justice would almost always be done. Hence, since this United States rule applies in all cases and is so simple as to be easily understood by everyone, it should be universally followed.

What, then, are the rights of a corporation upon an *ultra vires* contract to which it is a party, when it has executed its side of the contract, but the other party has not; and what are its obligations when the conditions are reversed? In England, apparently, and in Alabama it has no rights and is under no obligations, for there *ultra vires* contracts, and all acts done under them seem to give no rights whatever.[46] In many States the rule is directly contrary, and the corporation can enforce, or be compelled to perform such an executed contract, as if the doctrine of *ultra vires* did not exist.[47] But in the United States courts and in a few of the States a truer rule prevails. There, as in England, the contract itself is unenforceable, but "the remedy in case one of the parties has received a benefit under such a contract, which, *ex æquo et bono*, it ought not to retain, is a suit in disaffirmance and for an accounting."[48] It has been shown that the doctrine of *ultra vires* (a judicial creation, invented to place necessary restrictions on corporations), is founded on public policy, and therefore all contracts, falling under its ban, should be declared void and unenforceable; that, so long as the contract remains executory, all courts agree to this, but when one party has executed there is a conflict of authority on this point; that the rule, founded on estoppel, enforcing such contracts when executed on one side, is illogical, because estoppel applies to only a small percentage of such contracts, and bad, because it disregards the just rights of those who are interested in corporations; that the rule, declaring *ultra vires* contracts void, whether executory or executed on one side, applies to all classes of such contracts, and, as administered in the United States courts, through the medium of a suit in disaffirmance of the contract, does substantial justice in nearly all cases, and upholds public policy, while laying down a clear and definite principle to guide the business interests of the land.

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[45] 87 Ala. 344.
[46] See note 36.
[47] See notes 14 and 25.
[48] Miller v. Ins. Co. (Tenn.), 21 S. W. Rep. 39.

IMPEACHMENT OF WITNESS.

FALL BROOK COAL COMPANY v. HEWSON.

New York Court of Appeals, February 28, 1899.

A party who calls an adverse witness and, after asking him a few preliminary questions not material to the issues, excuses him, is not precluded from afterwards specifically impeaching his evidence given in favor of the other side when recalled by them. The party first calling the witness is not, under such circumstances, not only not bound by his evidence in favor of the other side, but he may call other witnesses to impeach him.

PARKER, C. J.: The defendant called as a witness one Wilson, who, after being sworn, testified as follows: "I reside in Penn Yan. I know the defendant. I did not work for him in the spring of 1893; I was at the cold storage at that time about ten minutes in the fore part of April." No other questions were asked him, nor did he give any further testimony, and the testimony quoted had no bearing whatever upon the issues on trial. It is suggested that he was called under a misapprehension, but, be that as it may, we shall assume merely in passing on the question growing out of his being called and sworn, that before any material question was asked, the party calling the witness excused him from the witness stand. When the plaintiff came to present evidence in rebuttal of the testimony adduced on the part of the defendant, it called Wilson to the stand, and he gave material testimony in favor of the plaintiff. The defendant, claiming the right to cross-examine him, asked him whether he had not, at specified times and places, made to other persons statements tending to contradict the testimony given by him upon the plaintiff's examination. Wilson denied having made them, and the defendant afterwards called witnesses who testified that Wilson had made the contradictory statements that he specifically denied having made; to this evidence the plaintiff objected upon the ground that it was incompetent, in that the defendant, having first sworn and examined Wilson as a witness in his own behalf, could not be allowed to discredit him by giving testimony that he had made statements out of court differing from his statements as a witness in court. The exception to the ruling of the court admitting the evidence, notwithstanding the objection, presents one of the questions which, on this review, it is urged, call for a reversal of the judgment. Upon a

motion for a new trial, this question was very carefully considered by Mr. Justice Rumsey, who reached the conclusion that no error had been committed, and the General Term has affirmed the position thus taken.

As the question is a novel one, we shall briefly state the reasons that persuade us that the view taken by the learned court was the correct one. The rule is well settled in this State that a party cannot show inconsistent statements made by his own witness for the purpose of impeaching him. Coulter v. Express Co., 56 N. Y. 585; Nichols v. White, 85 N. Y. 531; Hankinson v. Vantine, 152 N. Y. 20, 27. This rule, which was originally established by authority, came to us from England, where, as in some of our sister States, it has since been either abrogated or modified by statute. Stevens on Evidence (Chase Ed.), 329, note; Selover v. Bryant, 21 L. R. A. 418, note; American Law Review, vol. II, 261. Greenleaf on Evidence vol. I, sec. 442, states the reason for the rule as follows: "When a party offers a witness in proof of his cause, he thereby, in general, represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces; and having thus presented them to the court, the law will not permit the party afterwards to impeach their general reputation for truth, or to impugn their credibility by general evidence tending to show them to be unworthy of belief. For this would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him." See, also, Wharton on Evidence, sec. 549. The rule being established beyond change, save by legislative exactment, that one cannot impeach his own witness, the question presented here is whether Wilson became the defendant's witness within the meaning of the rule. Would he have become such had his name been simply called without administering the oath? If not, would he have become such through the additional act of administering the oath? If the propounding of questions be also necessary, would an inquiry as to his name and residence have made him the party's witness in such a sense that he would be bound to support his character from the beginning to the end of the trial, or would that have happened only upon some question being asked him material to the issues on trial? It often happens that a witness is intentionally but unadvisedly called, the counsel for the moment laboring under the impression that the witness has knowledge of some fact it is desirable to establish, but before his examination has proceeded far enough to bring about an inquiry touching any material fact to the controversy, counsel is advised by an associate, or by the party, that the wrong witness has been called, and that some other person is possessed of the information he desires to have given to the court. In such a case it would clearly seem to be a hardship that an error thus committed, which quite frequently happens in the press of trial, should burden a party with the responsibility of having the person called treated as a witness for that purpose throughout the trial.

So far as the diligence of the counsel and our examination have disclosed, this precise question has not been before the court of last resort in any of the States except Connecticut, where, many years ago, in the case of Beebe v. Tinker, 2 Root, 160, a witness was called and sworn; as to the point regarding which the plaintiff had called him to testify, the court ruled that it was not relevant to the issue, and thereupon the defendant took the witness and asked him several questions, the answers made by him being against the plaintiff. Thereupon the plaintiff offered to introduce witnesses to impeach, which was objected to on the ground that he was the plaintiff's witness. The report of the case concludes with: "The court admitted the witnesses to impeach his character on the ground that, although the plaintiff introduced him, yet, as the defendant only improved him, in that respect he was to be considered as the defendant's witness."

In England, where the rule originated, the tendency of the court seems to have been not to apply it unless the party has proceeded so far with the witness as to ask him some question bearing upon the issues on trial. In Creevy v. Carr, 7 Carr. & P. 64, a witness was called for the defendant and asked: "Are you the landlord of the house at which the fire occurred?" The witness answered: "I am, sir." Thereupon the court asked the defendant's counsel: "What do you propose to prove more?" and he replied: "My lord, I will close my case here." The counsel for the plaintiff said: "I wish to cross-examine the landlord;" and the court said: "Oh no, I stopped his evidence." Counsel: "He was asked a question and he answered it, and I have, therefore, a right to cross-examine him." The Court: "Not where the witness, as here, has only been asked an immaterial question and his evidence is stopped by the judge."

"In Wood v. McKinson, 2 Mood. & R. 273, a witness was called for the plaintiff and sworn in the usual way, but before he had put any questions to the witness, counsel stated that he had been misinstructed as to what the witness was able to prove, and he should not examine him at all. The witness being about to retire, counsel for the defendant claimed the right to cross-examine him, but the court said: "Here the learned counsel explains that there has been a mistake, which consisted in this, that the witness is found not to be able to speak at all as to the transaction which was supposed to be within his knowledge. This is, I think, such a mistake as entitles the party calling the witness to withdraw him without his being subject to cross-examination."

In Bracegirdle v. Bailey, 1 Fos. & F. 536, the plaintiff was sworn and tendered as a witness for cross-examination, but was not examined in chief. The defendant's counsel asked several questions touching his conduct and life; but the court ruled

that these questions could not be asked, inasmuch as he has proved nothing "that you could cross-examine him on to discredit him."

In Rush v. Smith, 1 Cromp., M. & R. 93, it was held that a witness called to produce documents, and sworn by mistake, and a question put to him that he does not answer, does not entitle the opposite party to cross-examine him.

The general view upon which these cases proceeded is that a party does not necessarily make a person his witness by merely calling and swearing him, and we are not able to discover any good reason for disagreeing with them. On the contrary, it seems to us that the rule is not properly applicable, save in cases where a party attempts to elicit from a witness called to the stand, testimony material to the issues upon trial; that until such an attempt is made, the party has done nothing that can by any possibility affect the trial either to his own benefit or to the harm of his opponent, and, therefore, he has not offered a witness in proof of his cause and is not within the reason of the rule that burdens him with the necessity of supporting the character of the witness to the end of the trial. His mistake, however caused, has not harmed the other party and the interests of justice can in nowise be promoted by permitting that other party to take such advantage of the mistake as will fasten upon his opponent the responsibility of vouching for the character of a witness actually hostile, and from whom he has not attempted to secure any proof in the cause.

The learned counsel for the appellant urges that his exception taken to that portion of the charge in which the court stated "that the plaintiff was not entitled to recover if the plant was not properly run," calls for a reversal of the judgment. The defendant admitted the making of the contract upon which the plaintiff sued, but alleged that the contract had not been properly performed by the plaintiff, and sought to recover his damages. In the charge to the jury the court did not say that the plaintiff could not recover for the services unless it convinced the jury, by a fair preponderance of evidence, that it did keep the apples in proper cold storage, etc. But, as we read the exception, it was not intended to have, nor is it likely it had, the effect of calling the attention of the court to the fact that the counsel for the plaintiff claimed that there was error in the charge as to the burden of proof. The language of the exception, apparently, related solely to another portion of the charge, in which the court said that if the jury should find "that the rotting was the result of the plant having been improperly run, it follows that the plaintiff has not performed its contract; it also follows that whatever damage has been thus caused to the defendant, he should be compensated for in this action." This portion of the charge was not error, and the exception to which our attention is called pointed to this and to no other part of the charge.

The judgment should be affirmed, with costs. All concur. Judgment affirmed.

NOTE.—*Recent Decisions on Subject of Impeachment of One's Own Witness.*—A witness cannot be impeached by the party calling him, unless he testifies to some matter prejudicial to such party. It is not enough that witness merely fails to testify to facts sought to be proven by him. Blough v. Farry (Ind.), 40 N. E. Rep. 70. Where a witness disproved the case of the party who called him, to that party's surprise, he may be asked whether he did not make a statement to such party conflicting with his testimony, and which, if proved, would tend to prove such party's case. George v. Triplett (N. Dak.), 63 N. W. Rep. 891. In a criminal case the State cannot impeach the general character for truth and veracity of one of its own witnesses. State v. Keefe, 54 Kan. 197, 38 Pac. Rep. 302. A person whose witness testifies contrary to the way he has been led to believe he would do cannot prove that the witness had made prior statements to the contrary. *In re* Kennedy's Estate, 104 Cal. 429, 38 Pac. Rep. 93. A party cannot impeach his own witness, though her testimony be favorable to the other party. Smith v. Dawley (Iowa), 60 N. W. Rep. 625. Under Rev. St. sec. 1101, permitting a party producing a witness to impeach him when he proves adverse, a witness cannot be impeached who simply fails to testify to beneficial facts that were expected from him, but he must become adverse by giving evidence that is prejudicial to the cause of the party producing him. Adams v. State, 34 Fla. 185, 15 South. Rep. 905. On an issue between a grantee and a creditor of the grantor as to whether the deed was given as security, where the creditor called the grantor, who testified that the sale was absolute, it was error to allow another witness for the creditor to testify that the grantor told him he conveyed the land as security. Hyde v. Buckner, 108 Cal. 522, 41 Pac. Rep. 416. The fact that a party to an action in which the *bona fides* of a transaction is in question uses his adversary as a witness does not preclude him from showing that the adversary had made statements contradictory of his testimony as original evidence of his admissions. Griffis v. Whitson (Kan. App.), 43 Pac. Rep. 813. A party may contradict his own witness. Darling v. Vickers, 47 La. Ann. 1574, 18 South. Rep. 639. One cannot, on the ground of surprise, discredit his own witness by proof of contradictory statements previously made by him, where he has not shown that his witness ever told him she would testify she made the statements he desired to prove she had made, or that she ever, in fact, made the statements. State v. Burks (Mo. Sup.), 34 S. W. Rep. 48. In an action by a judgment creditor to set aside a deed as fraudulent, when plaintiff puts in evidence the deposition of the judgment debtor in supplementary proceedings, and the debtor testifies for defendants, plaintiff may, on cross-examination, impeach him by showing that his deposition was untrue. Salt Springs Nat. Bank v. Fancher, 36 N. Y. S. 742, 92 Hun, 327. A party is not precluded from contradicting the adverse testimony of his own witness, where the matter in dispute is directly at issue in the case. Cruse v. Findlay (Sup.), 38 N. Y. S. 741, 16 Misc. Rep. 576. On the separate trial of a defendant jointly indicted for murder, on the theory that he procured his co-defendant, to commit the homicide, that the co-defendant, when placed on the stand by the State, denies having made statements that defendant offered him money to do away with deceased, and that he had received money from defendant, does not entitle the State to impeach him by introducing contradictory statements in a confession by the witness involuntarily made. State v. Steeves (Oreg.), 42 Pac. Rep. 947.

Where a witness for the State testifies that he suggested a certain thing which it is for the interest of the State to show was suggested by another, it may impeach him by showing that he stated to others that it was suggested by such other person. Kirk v. State (Tex. Cr. App.), 32 S. W. Rep. 1045. Defendant cannot impeach the prosecuting witness by placing him on the stand, and, on his denial of statements imputed to him, contradicting him by other witnesses. People v. Crepsi, 115 Cal. 50, 46 Pac. Rep. 863. A party cannot introduce testimony to show that his own witness has made statements out of court inconsistent with his testimony. Wheeler v. Thomas, 67 Conn. 577, 35 Atl. Rep. 499. Plaintiff may discredit a witness as to facts testified to when called by defendant, by evidence of contrary statements, though earlier in the trial he has been called as a witness by plaintiff. Hall v. Incorporated Town of Manson, 34 L. R. A. 207, 68 N. W. Rep. 922. Where the State is surprised by the testimony of its witness that she does not know who the guilty persons were, she may be asked if she did not make an affidavit stating that defendant was one of them, and that she would know the other if she saw him again. People v. Gillespie (Mich.), 69 N. W. Rep. 480. Under Code Cr. Proc. 1895, art. 795, providing that a party may attack his own testimony when the facts stated by the witness are injurious to his cause, the State, in a prosecution for cattle stealing, on its witness denying that defendant admitted to him having taken up the cattle, claiming to have done so by mistake, and testifying, instead, that another person admitted having done so, may, to impeach such witness, show a contradictory statement by him. Storms v. State (Tex. Cr. App.), 37 S. W. Rep. 439. Where, on a second trial, the testimony of a witness on material points is unfavorable to the party calling him, while on the first trial it was otherwise, it is not error to allow the party to lead the witness, and cross-examine him as to his testimony on the first trial, and, on being surprised by his answers, to prove that he testified differently on the former trial. Southwestern Coal & Improvement Co. v. Rohr (Tex. Civ. App.), 39 S. W. Rep. 1017. One cannot impeach his own witness who does not testify to facts damaging to him, but simply denies having stated facts that might have been beneficial to him had she testified to them. Bailey v. State (Tex. Civ. App.), 40 S. W. Rep. 281. A defendant who introduces a deposition in support of his plea in abatement for want of jurisdiction cannot destroy the effect of the testimony by argument that the witness is unworthy of belief, nor sustain his plea on an inference that the answers to certain questions which the witness refused to answer would have disclosed facts showing want of jurisdiction. Ashley v. Board of Sup'rs of Presque Isle County, 27 C. C. A. 595, 83 Fed. Rep. 534. The sister of prosecutor, as a witness for defendant, testified that prosecutor did not tell her "that he did not know who hit him." Held, that a question then asked of her, if she did not tell defendant's father that she would swear that prosecutor came home soon after he was struck, and told her he did not know who hit him, was competent to show surprise, and relieve defendant of the unexpected evidence, although incidentally it might impeach defendant's witness. Thomas v. State, 23 South. Rep. 665. Defendant, claiming that a note in suit was forged, made one who claimed to be present when the note was signed his own witness to give evidence to fix the time and place of the signing of the note. Held competent for other of defendant's witnesses to testify that the alleged maker was at some other place at the time sworn to by said witness, though their testimony tended to impeach him. Brown v. Tourtelotte, 50 Pac. Rep. 195. Rev. St. 1894, sec. 515 (Rev. St. 1881, sec. 507), provides that a party cannot impeach his own witness by evidence of bad character, unless it was indispensable that the party should produce him, or in case of manifest surprise, when the party has such right, but "he may in all cases contradict him by other evidence, and by showing that he has made statements different from his present testimony." Held, that the only limitation on the right of either party in a criminal case to impeach its or his own witness by showing contradictory statements, is that he shall not be contradicted unless he has given testimony prejudicial to the party calling him. Schnuer v. State, 18 Ind. App. 226, 47 N. E. Rep. 843. Where defendant is surprised by the testimony of one of his own witnesses, and such witness shows on cross-examination that he is hostile to defendant defendant may discredit the testimony given by such witness on cross-examination. Bacot v. Hazlehurst Lumber Co., 23 South. Rep. 481. Under Code Civ. Proc., secs. 3377, 3380, authorizing a party to contradict his own witness by other evidence, and to ask him whether he had made other statements, the State, in a criminal prosecution, may cross-examine its witness, where his testimony varies from what the county attorney had reason to believe it would be. State v. Bloor, 52 Pac. Rep. 511. A party who calls a witness impliedly recommends him as worthy of belief, and afterwards cannot be permitted to introduce evidence which has no tendency other than to impeach such witness. Nathan v. Sands, 72 N. W. Rep. 1030. While a plaintiff, who call defendants as his own witnesses, cannot impeach their character for veracity generally, he may show that the whole or any part of what they have sworn to is untrue, either by their own examination and the improbability of their own story, or by other contradictory evidence material to the issue. Thorp v. Leibrecht, 39 Atl. Rep. 361. A party may cross examine his own witness, and subsequently contradict him, when it appears that his testimony has taken counsel by surprise, and is contrary to what the witness has said in an examination preparatory for trial. Gray v. Hartman, 41 W. N. C. 286. A witness who has sworn to certain facts in a former trial, involving the same matter, and contradicts them in a subsequent trial, may be contradicted by the party producing him, even though the witness, in an interview, before being sworn, declares that he will testify as he does, inasmuch as a party has a right to believe that a witness will not perjure himself. Blake v. State, 43 S. W. Rep. 107. A State's witness, in a prosecution for burglary, having testified that, some time before defendant delivered the stolen goods, a peddler had offered them to her, an affidavit of the witness impeaching such testimony, and stating that she was drunk on the trial, was admissible, where the prosecution, though informed that the witness would testify adversely, could not have foreseen that she would give that particular testimony. Young v. State, 44 S. W. Rep. 835. The State may impeach its own witness, where he states an affirmative fact injurious and in the nature of a surprise to the State. Ross v. State, 45 S. W. Rep. 808. The State may impeach its own witnesses in criminal cases, on account of the obligation resting on it to bring forward all witnesses obtainable for a criminal prosecution, irrespective of their character. State v. Slack, 69 Vt. 486, 38 Atl. Rep. 311. A party voluntarily calling a witness in his own behalf was allowed, in the course of his examination, to read from his testimony given in another case, and

to examine him in reference thereto in order to contradict him. Held error, since a party could not impeach his own witness. Collins v. Hoehle, 75 N. W. Rep. 416.

BOOK REVIEWS.

BOUVIER'S LAW DICTIONARY, VOL. 2.

At the time of its receipt we called attention, in terms of praise, to the appearance of the first volume of this sterling work. An examination of volume two, before us, fully justifies the favorable manner in which we spoke. This law dictionary is undoubtedly the most exhaustive and complete that is to be had. While, perhaps, in accuracy and general details, it is not superior to some others that have made their appearance within recent years, in exhaustiveness, comprehensiveness and thoroughness, it is the superior of all. It is in the shape of two very large volumes, handsomely printed, is edited by Francis Rawle, Esq., of the Philadelphia Bar, and published by the Boston Book Co., Boston.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADMINISTRATION — Extraterritorial Force.—Where an administrator takes out letters on his intestate's estate in different States, such letters have no extraterritorial force outside the State in which they are issued; and hence a creditor of the estate, after recovering judgment against such administrator in one State, cannot proceed against him on such judgment in another State, where he also took out letters, for a *devastavit* committed in the latter State.—STATE v. FULTON, Tenn., 49 S. W. Rep. 297.

2. ADMINISTRATORS—Qualifications—Non-residents.—A non-resident may be appointed administrator of a deceased resident's estate situate in Alabama.—FULGHAM v. FULGHAM, Ala., 24 South. Rep. 851.

3. APPEAL — Allowance for Support — Judgment.—A judgment, in an action to establish plaintiff's right under a will, fixing an allowance for his support during the pendency of the suit, and ordering execution therefor, is final; and an appeal may be prosecuted during the pendency of the suit.—MCCREARY v. ROBINSON, Tex., 49 S. W. Rep. 212.

4. APPEALS — Final Judgment.—Where defendant pleads in reconvention, and a judgment for costs is rendered for him without in any way referring to his cause of action in reconvention, the judgment is not final, so as to be appealable.—AMERICAN ROAD-MACH. CO. v. CITY OF CROCKETT, Tex., 49 S. W. Rep. 251.

5. APPEAL—Final Judgment.—In an action for the recovery of real estate, personalty, and moneys received, a judgment for the recovery of a certain sum is a final judgment, from which an appeal may be taken, though no disposition of the real estate is made therein.—DAVIES v. THOMSON, Tex., 49 S. W. Rep. 215.

6. ARBITRATION AND AWARD — Parol Submission.—Where one verbally submitted the amount of another's debt to arbitration, without promising in writing to pay it, as required by the statute of frauds, he is not liable on the award.—BRYANT v. ELLIS' ADMR., Tex., 49 S. W. Rep. 234.

7. ARREST—Special Policeman—Authority.—An ordinance authorizing a policeman to make an arrest without a warrant when a city ordinance or State law is violated in his presence is to be construed in connection with Code Cr. Proc. 1895, art. 247, allowing a police officer to make an arrest without a warrant only for a felony or for an offense "against the public peace;" so that it does not authorize arrest without a warrant for selling a railroad ticket without a certificate of authority, which Pen. Code 1895, art. 1010c, makes an offense subject to penalty provided.—MISSOURI, K. & T. RY. CO. OF TEXAS v. WARNER, Tex., 49 S. W. Rep. 254.

8. ATTACHMENT - Deeds—Recording.—Recording of a deed of land subject to a mortgage, after the levy of an attachment thereon, will charge the attaching creditor with constructive notice of the grantee's claim; and hence failure of the grantee to object to the subsequent payment of the mortgage by such creditor will not estop him from asserting his claim.—CALDWELL v. BRYAN'S EXR., Tex., 49 S. W. Rep. 240.

9. ATTACHMENT — Excessive Sale.—Plaintiff in an attachment is liable for the market value of goods sold in excess of what is reasonably necessary to pay the debt and expenses, and for exemplary damages, if such sale is malicious or wanton.—SMITH v. MATHER, Tex., 49 S. W. Rep. 257.

10. ATTACHMENT — Subsequent Lienholders.—Where an attaching creditor purchases a prior chattel mortgage, and has the same assigned to him, it is not a payment of the mortgage, within Acts 21st Gen. Assem., ch. 117, providing that attaching creditors may take possession of mortgaged chattels upon paying the mortgage debt.—WEBSTER CITY GROCER CO. v. LOSEY, Iowa, 78 N. W. Rep. 75.

11. BANKS AND BANKING—Collections.—Where a bank receives a draft, with directions to collect, and notify the owner, and its correspondent collects the fund, the mere crediting of the proceeds to the owner on its books, though it has an open account with him, does not change its relation of agent to that of debtor. Hence, the bank having failed, and the fund having been paid by the correspondent to the receiver, the owner might follow the fund.—GUIGNON v. FIRST NAT. BANK OF HELENA, Mont., 55 Pac. Rep. 1051.

12. BANKRUPTCY—Property in Possession of Receiver of State Court.—Where a corporation has made a general assignment for the benefit of its creditors, and a State court, on a bill in equity, has appointed the assignee as receiver to take charge of the assigned estate

and wind up the affairs of the assignor, and the corporation is afterwards adjudged bankrupt, jurisdiction to administer and distribute the entire estate of the bankrupt belongs to the court of bankruptcy, to the exclusion of the State court, and the former court may enjoin all parties from further proceedings in the latter court.—LEA V. GEORGE M. WEST CO., U. S. D. C., E. D. (Va.), 91 Fed. Rep. 237.

13. BILLS AND NOTES—Collateral—Mortgage.—Where one of the members of a firm gave his notes secured by a mortgage as collateral security to a bank, for notes of third persons, all of which were discounted for the benefit of the firm, partly on the firm's indorsement, and partly on the indorsement of the other member, the bank is entitled to hold both notes and mortgage until its claim is paid, without attempting to collect the discounted notes from the makers and indorsers.—CLARE COUNTY SAV. BANK V. GOODMAN, Mich., 78 N. W. Rep. 135.

14. BILLS AND NOTES — Consideration—Knowledge of Holder.—In an action by a first indorsee of a note against the maker, articles published in a local newspaper, to which plaintiff was a subscriber, prior to the transfer of the note to him, to the effect that the payee corporation was fictitious, and the notes given to it were without consideration, are admissible to show bad faith.—HAGGARD V. PETTERSON, Iowa, 78 N. W. Rep. 53.

15. BILLS AND NOTES—Delivery — Discharge of Sureties.—Where a note is delivered by the principal in violation of an agreement with the sureties that it should not be delivered until certain costs were paid, and liability of sureties on another undertaking released, of which agreement the payee was ignorant, he can recover as against them.—SAWYERS V. CAMPBELL, Iowa, 78 N. W. Rep. 56.

16. BILLS AND NOTES—Description of Makers.—Parol evidence is inadmissible to show that a note signed by the makers as "Board of Business Managers" was the obligation of a corporation of which they were the board of business managers, and not their individual note, the words used being mere *descriptio personæ*.—RICHMOND LOCOMOTIVE & MACH. WORKS V. MORAGNE, Ala., 24 South. Rep. 834.

17. BILLS AND NOTES—Maturity.—One of two joint makers of a note executed a mortgage to secure it, stipulating that, in case of a default in the interest, the principal should become due. For failure to pay the interest, the principal was declared due under the mortgage, judgment was entered thereon against the mortgagor, and the mortgage was foreclosed. Held, that the note did not thereby become due, so as to charge the payee on his indorsement made on the transfer of the note.—TREASE V. HAGGIN, Iowa, 78 N. W. Rep. 58.

18. BILLS AND NOTES—Notice of Protest.—If notice of protest is received in time, it is immaterial whether it was given in person or by mail.—MONARCH V. FARMERS' & TRADERS' BANK, Ky., 49 S. W. Rep. 319.

19. CARRIERS—Connecting Lines.—A bill of lading acknowledging receipt of goods from a shipper to be transported by the receiving carrier to the end of its line, and thence by connecting lines to Louisville, Ky., is, construing it most strongly against the carrier, a contract for through shipment by the initial carrier, the connecting line being merely its agent to carry out the undertaking.—IRELAND V. MOBILE & O. R. CO., Ky., 49 S. W. Rep. 188.

20. CARRIERS—Live Stock—Measure of Damages.—The measure of damages for an injury to a consignment of stock is the difference between their market value at their destination and their value in the condition in which they should have arrived.—GULF, W. T. & P. RY. CO. V. STATON, Tex., 49 S. W. Rep. 277.

21. CARRIER OF GOODS—Interstate Commerce.—Where a carrier transports freight from a point in another State under a contract for its delivery f. o. b. cars of a Texas railway, to be shipped to another point in Texas, the latter carrier is engaged in interstate commerce, and not subject to the State railroad commission regulations.—STATE V. SOUTHERN KAN. RY. CO. OF TEXAS, Tex., 49 S. W. Rep. 252.

22. CARRIERS OF LIVE STOCK—Pleading—Variance.—Under a petition averring that live stock was to be transported by defendant carrier from L to T, which was beyond its terminus, and that the stock was injured between L and N, the terminus of defendant's line, evidence that the stock was to be transported only to N does not constitute a variance.—LOUISVILLE & N. R. CO. V. WATHEN, Ky., 49 S. W. Rep. 185.

23. CARRIERS OF PASSENGERS—Injuries—Acts of Fellow-passengers.—A carrier is not liable to a passenger for injuries received by the fall of another passenger, who was jostled by the conductor while removing a drunken passenger from the car in the exercise of due care.—SPADE V. LYNN & B. R. R., Mass., 52 N. E. Rep. 747.

24. CHATTEL MORTGAGES—Future-acquired Property.—A written instrument, whereby defendant "conveyed and delivered unto the possession" of plaintiffs certain grain stored at a particular point, further provided that the transfer was by way of mortgage, to secure an indebtedness due plaintiffs; that they should sell the grain, apply the proceeds to his indebtedness, and account to defendant for the balance; and that "the receipt" was assignable by indorsement. Held, that the instrument was a chattel mortgage, and not a warehouse receipt.—SNYDACKER V. STUBBLEFIELD, Ill., 52 N. E. Rep. 742.

25. CHATTEL MORTGAGE—Purchase from Mortgagor.—A purchaser of chattels from the mortgagor, upon which there is a mortgage, takes his title free of the lien, if the sale was made with the authority or consent of the mortgagee. Such authority need not be in writing. It may be express or implied from the conduct of the mortgagee with reference to the mortgaged property.—PARTRIDGE V. MINNESOTA & D. ELEVATOR CO., Minn., 78 N. W. Rep. 85.

26. CONTRACT—Construction.—A written contract by which defendant gave plaintiff the exclusive sale of a manufactured article in a certain territory during a specified term, and which provided that in case plaintiff succeeded in doing such a business as defendant might "reasonably expect" it should be renewed for a further term, is not so indefinite or uncertain in its terms that it will not support an action for damages for a refusal of defendant to renew at the expiration of the first term, the amount of business which defendant could reasonably expect being a matter which may properly and with sufficient certainty be determined by a jury, to which tribunal the parties by their contract in effect referred it in case of their disagreement.—WORTHINGTON V. BEEMAN, U. S. C. C. of App., Seventh Circuit, 91 Fed. Rep. 232.

27. CONTRACTS — Husband and Wife — Statute of Frauds.—Defendant's husband ordered chairs of plaintiff for a boat of which he was master. Plaintiff testified that he looked up the husband's financial standing, and extended no credit to him; that before the chairs were delivered he stated that defendant owned the boat, and would settle for them, on which statement plaintiff relied; that shortly after delivery defendant stated she would see that the chairs were returned, or that plaintiff was paid for them, all of which defendant and her husband denied. Held, that the evidence showed an original contract with defendant, and not an agreement to answer for her husband's debt.—FOSTER, CHARLES & EWEN CO. V. FELCHER, Mich., 78 N. W. Rep. 120.

28. CONTRACTS—Negligence of Contractor.—Under an agreement by a contractor to erect a three story brick building in a good, substantial, and workmanlike manner, and to excavate to a certain depth, and as much farther as was necessary, for a solid foundation, where the foundation was laid at less than the required depth, in wet, swampy ground of such character as to

suggest to a man of ordinary prudence that the wall would not stand, the contractor cannot escape liability to the owner because of the approval of the architect who had the supervision of the work as agent of the owner.—CHANDLER v. WHEELER, Tenn., 49 S. W. Rep. 278.

29. CORPORATIONS—Contracts—Ratification—Notice.—Where a corporation ratifies a contract made by its president without authority, it is bound by any declarations he may have made during the negotiation determining the meaning of an ambiguity, since it is presumed to have notice of all the facts relating to the negotiation.—BALFOUR v. FRESNO CANAL & IRRIGATION CO., Cal., 55 Pac. Rep. 1062.

30. CORPORATIONS—Power to Become Surety.—A corporation, unless organized for the express purpose of becoming surety for others, has no power to do so unless the contract is to its manifest advantage.—M. V. MONARCH CO. v. FARMERS' & DROVERS' BANK, Ky., 49 S. W. Rep. 317.

31. CORPORATIONS — Repudiation of Contract Ultra Vires.—A *quasi*-public corporation, like a water company, which has, in violation of statute and *ultra vires*, issued bonds, which it has distributed among its stockholders without consideration, is not estopped, on the ground that it is *in pari delicto*, from maintaining a suit in equity to restrain the enforcement of such bonds, and to compel their surrender for cancellation, where they are still in the hands of the stockholders, and the fraudulent scheme is, therefore, practically still executory.—GUNNISON GAS & WATER CO. v. WHITAKER, U. S. C. C., E. D. (Mo.), 91 Fed. Rep. 191.

32. CORPORATIONS—Ultra Vires—Estoppel.—Pursuant to an agreement to that effect with a corporation, purchasers of merchandise referred the seller to the corporation to which they were indebted for information as to their financial standing and the value of certain stock which was to be given as collateral for the price. The officers of the corporation falsely represented the purchasers as solvent and the stock as good security. The goods purchased were then pledged to the corporation as security for its claim, and it took possession thereof and sold them. Held, that the corporation was estopped from asserting that the making of the representations was *ultra vires*.—AMERICAN NAT. BANK OF DENVER v. HAMMOND, Colo., 55 Pac. Rep. 1089.

33. CREDITORS' BILL—Insolvent Railroads—Distribution of Assets.—A creditors' bill against an insolvent railroad corporation is merely an equitable levy, for the benefit of all creditors, secured and unsecured, and the question of priority is to be settled in the same manner as if execution at law had been levied, at precisely the same time, upon judgments duly rendered, for all claims found by the court to be just; and where, under State statutes, certain favored classes of judgments are given priority over mortgage or other liens upon the property in that State, such priorities are to be recognized and enforced on distribution the same as though execution had been levied under the judgments.—THOMAS v. CINCINNATI, N. O. & T. P. RY. CO., U. S. C. C., S. D. (Ohio), 91 Fed. Rep. 202.

34. CRIMINAL LAW—Grand Jury—Irregularity in Organization.—Const. art. 7, § 18, provides that the grand jury shall be chosen from the whole number of jurors in attendance at the court, and Cr. Code, tit. 1, ch. 5, that the names of those who are to constitute the grand jury shall be drawn by lot from a box containing the names of such jurors written on separate ballots. A member of the grand jury became ill and was excused, after such body had been duly impaneled, and another juror, to serve in his place, was drawn from the box after 12 of the remaining jurors had been drawn and impaneled as a trial jury. Held, that such irregularity did not render the grand jury an illegal body, nor its proceedings void.—STATE v. WITT, Oreg., 55 Pac. Rep. 1058.

35. CRIMINAL LAW — Homicide—Instructions.—In a prosecution for murder, after the court defined, in its charge, who principals are, and charged as to the guilt of the person by whom the killing was actually done, it was proper to instruct that if the jury believed that defendant acted with such person in the killing, in pursuance of a common intent on the part of each, and in pursuance of a previously formed design, in which their minds united and concurred, etc., without telling the jury in that connection that the common intent must have been to kill deceased.—ALEXANDER v. STATE, Tex., 49 S. W. Rep. 229.

36. CRIMINAL LAW—Remarks of Prosecuting Attorney.—Where, on trial for larceny, a person already convicted of the same theft is introduced by the State, and refuses to testify, it is reversible error for prosecuting attorney, where there was nothing to show any understanding between the witness and the defendant, to argue to the jury that the guilt of the accused was to be inferred from the refusal of the witness to testify.—STATE v. HARPER, Oreg., 55 Pac. Rep. 1075.

37. CRIMINAL PRACTICE—Indictment—Malicious Mischief.—An indictment charging defendant with "willfully and unlawfully" exposing poison, intending that another's horse should take it, does not charge an offense, under Code 1873, § 3977, making it malicious mischief to "maliciously administer poison to any such animals, or expose any poison with intent that the same shall be taken by them.—STATE v. LIGHTFOOT Iowa, 78 N. W. Rep. 41.

38. DECEIT — Pleading—Variance.—Where a declaration for deceit alleges that plaintiff "was induced by the defendants to purchase certain stocks," which were worthless, "for which he paid the defendants" a certain sum, it is not a variance that the proof shows that a third person, and not defendants, owned the stocks, and that the payments made to defendants were received for such person.—HASSE v. FREUD, Mich., 78 N. W. Rep. 131.

39. DEED OF MARRIED WOMAN—Recording of Deed.—Under Ky. St. § 2129, providing that "husband and wife may sell and convey her lands and chattels real, but the conveyance must be acknowledged and recorded in the same manner as required by the chapter on conveyances," the deed of a married woman, in which the husband joins, is valid, though not lodged for record until after her death; there being no time fixed by the statute in which the deed shall be lodged for record.—CRAWFORD v. TATE, Ky., 49 S. W. Rep. 307.

40. DIVORCE—Jurisdiction.—Gen. St. 1894, § 4792, provides that "no divorce shall be granted unless the complainant has resided in this State one year immediately preceding the time of exhibiting the complaint, except for adultery committed while the complainant was a resident of the State." Held, that this fact of the plaintiff's residence is jurisdictional, and must be alleged in the complaint.—THELAN v. THELAN, Minn., 78 N. W. Rep. 108.

41. DURESS—Note.—A maker testified that he signed a note because the payee threatened to make it cost him his farm, and to prosecute him for obtaining property under false pretenses, and that he did not know whether he had done anything criminal or not. He was a man of intelligence, and was surrounded by his family, some of whom counseled him against signing the note. None of the family seemed to be much frightened, and his wife sought to have a constable called to arrest the payee. Held, that the note was not given under duress.—JAMES v. DALBEY, Iowa, 78 N. W. Rep. 51.

42. EASEMENT—Right of Way—Grant.—Provision of a deed that the grantee should have "a free and undisturbed right to the use" of a way is not a grant of an open way, preventing the grantor from maintaining gates at the termini.—BOYD v. BLOOM, Ind., 52 N. E. Rep. 751.

43. EVIDENCE—Parol Evidence.—Where a bond of indemnity is plain and unambiguous, parol evidence that it was conditioned on immediate notice to the surety of any default by the obligee is inadmissible.—MASON & HAMLIN CO. v. GAGE, Mich., 78 N. W. Rep. 130.

44. EVIDENCE—Secondary Evidence.—As a subpœna cannot be issued to any other county than that in which the trial court sits, and as, under Rev. St. 1895, arts. 2282-2284, an officer taking deposition can compel witness to answer the interrogatories, and sign the same, but has no power given him to compel witness to deliver or attach papers on the refusal of a witness to attach to his deposition, taken in a county other than that of place of trial, original documents, is a sufficient foundation for the introduction of copies.—SAYLES V. BRADLEY & METCALF CO., Tex., 49 S. W. Rep. 209.

45. EXECUTION — Exemptions—Head of Family.—Under section 3625, Rev. Codes, an unmarried man who has residing with him, and under his care and maintenance, a married adult brother, who is unable to take care of or support himself, is the head of the family.—WEBSTER V. MCGAUVRAN, N. Dak., 78 N. W. Rep. 80.

46. FEDERAL COURTS — Citizenship.—The fact that a complainant was required by his business to remain in the city of Washington much of the time for a number of years before the commencement of the suit and during its pendency, during which time his wife (he having no children) remained with him there, did not deprive him of his citizenship in a State where he had an established business, and where he continued to claim and exercise the right of citizenship.—CALDWELL V. FIRTH, U. S. C. C. of App., Fifth Circuit, 91 Fed. Rep. 177.

47. FIXTURES — Mortgage.—Where a contract of sale of chattels intended for annexation to the soil stipulates that title shall not pass until full payment of the price, and the chattels are annexed, and the price is not paid as agreed, the seller may assert his title as against a subsequent mortgagee for present value without notice.—W. T. ADAMS MACH. CO. V. INTERSTATE BLDG. & LOAN ASSN., Ala., 24 South. Rep. 857.

48. FRAUDS, STATUTE OF — Contract not to be Performed in a Year.—A contract of employment to render services for a year, to commence in the future, is a contract within the statute of frauds, as an agreement not to be performed within a year from the making thereof, so that, being oral, action to enforce it, or to recover damages for its breach, cannot be maintained.—BOARD OF COMRS. OF CLARK COUNTY V. HOWELL, Ind., 52 N. E. Rep. 769.

49. FRAUDULENT CONVEYANCES—Preferring Creditor.—The right of a debtor in failing circumstances to prefer some of his creditors is subject only to the limitation that the transaction resulting in the preference must be an honest one, and not designed to hinder, delay, or defraud other creditors.—TACKABERRY V. GILMORE, Neb., 78 N. W. Rep. 32.

50. FRAUDULENT CONVEYANCES — Transfers in Payment of Debts—Intent.—An absolute conveyance by an insolvent debtor, in payment of a *bona fide* debt equal in amount to the value of the property, is valid, regardless of a common intent of the parties to defraud other creditors.—MORROW V. CAMPBELL, Ala., 24 South. Rep. 852.

51. HABEAS CORPUS—Appeal Pending.—Where a person is committed by the district court for contempt, and appeals to the court of appeals, he cannot thereafter, pending appeal, bring *habeas corpus* in the supreme court for the purpose of reviewing the same judgment from which the appeal was taken.—IN RE DOYLE, Colo., 55 Pac. Rep. 1080.

52. HIGHWAYS—Prescription.—Where the public use of a road is interrupted before the expiration of 20 years by an act of the owner of the land over which it runs, manifesting an intention to withdraw the land from the public use, the right by prescription fails, and, if afterwards asserted from subsequent use, the time necessary to perfect it must begin anew, and be computed from the date of such interruption.—WHALEY V. WILSON, Ala., 24 South. Rep. 855.

53. HOMESTEAD—Abandonment.—Testator devised to his wife the excess in value over $1,000 of certain lots, with the tenements and improvements thereon, for her life, and then over to his heirs in fee; referring to the realty as his homestead, and expressing an intention "to give her the homestead, and all in excess in value of the $1,000 in said premises,—meaning to devise the entirety" thereof. She accepted in writing the provisions of the will. Held, that her estate, being under the will an absolute estate for life, and not having been acquired by virtue of the statute, was not subject to be lost by abandonment.—CARR V. CARR, Ill., 52 N. E. Rep. 732.

54. HUSBAND AND WIFE—Actions—Alimony.—A petition by a husband against his wife to set off an excess paid her under an improper order, against her demand for alimony, is not demurrable as being an action between husband and wife, since it is a defensive action of the husband, arising in the wife's suit for divorce, against her demand for alimony.—JOHNSON V. JOHNSON, Tenn., 49 S. W. Rep. 305.

55. HUSBAND AND WIFE — Action for Separate Maintenance.—The wife may sue her husband for separate maintenance without suing for divorce.—IN RE POPEJOY, Colo., 55 Pac. Rep. 1083.

56. HUSBAND AND WIFE—Conveyances—Ratification.—Where a husband buys land in his own name, with his wife's money, the wife ratifies the transaction by acquiescing therein five years with knowledge of the facts, or by accepting the application of the land to the payment of her debts.—THOMPSON V. STRINGFELLOW, Ala., 24 South. Rep. 849.

57. INJUNCTION — Parties — Corporate Name.—An injunction restraining a corporation from using its corporate name does not practically annul it, authority to choose another name being given it by Gen. Laws, ch. 176, § 7, relating to an increase of stock, and providing that its articles of agreement may be amended in any other particular, except as provided in section 8, relating to a decrease of stock.—ARMINGTON V. PALMER, R. I., 42 Atl. Rep. 308.

58. INSURANCE — "Warranty."—A warranty in an insurance contract is a statement susceptible of being construed only as meaning that the parties intended that the policy should not be binding unless such statement was literally true.—PHŒNIX ASSUR. CO. OF LONDON V. MUNGER IMPROVED COTTON MACH. MFG. CO., Tex., 49 S. W. Rep. 222.

59. JUDGMENTS—Construction—Res Judicata.—A preliminary injunction, perpetuated by a decree reserving other questions, is unaffected by a dismissal of the suit for want of prosecution at a subsequent term.—EX PARTE GIST, Ala., 24 South. Rep. 831.

60. JUDGMENT—Execution—Sale.—An execution defendant is not estopped, by his presence at the sale, without interposing an objection, to avoid the sale as being on a dormant judgment, he not knowing the judgment was dormant.—HERZBERG V. HOLLIS, Ala., 24 South. Rep. 842.

61. JUDGMENT AGAINST AGENT—Bills and Notes.—In an action against S as agent for an estate on a bill accepted by him as such agent, a judgment against him as agent was proper, as execution thereon will not go against his individual property, but be levied on assets in his hands as agent.—RUDD V. DEPOSIT BANK, Ky., 49 S. W. Rep. 207.

62. LANDLORD AND TENANT—Construction of Lease.—Where a lease of a stable for one year contained an agreement to rent the stable to the lessee "for as many as five consecutive years," provided he should want to keep it at the same price per year, the lessee having given notice to the lessors, during the first year, of his election to keep the premises for five years, the contract to rent for that time became binding on both parties, and the lessors were not entitled to possession at the end of the year.—CONNOR V. WITHERS, Ky., 49 S. W. Rep. 309.

63. LANDLORD AND TENANT—Lien for Rent—Mortgages.—A lease executed October 16, 1890, contained a provision that it should operate as a lien on all the

personal property of the lessees at any time in or upon the demised premises, to secure payment of rent. The building leased was in process of erection for use as an hotel, and was not completed until January, 1891. The furniture was ordered for the hotel after the lease had been made, and, because of delays in finishing the building, was not placed in the hotel until December, 1890, and January, 1891. In January, 1895, there was rent unpaid, and the lessees' successors mortgaged the furniture to secure debts by them owing to other parties, who were aware of the above-noted provision in the lease. Held, that the mortgagees were entitled to the first lien upon the furniture mortgaged.—NEW LINCOLN HOTEL CO. v. SHEARS, Neb., 78 N. W. Rep. 25.

64. LANDLORD AND TENANT—Negligence.—Where there is no evidence to show what length of time unknown to landlord a nail had protruded from the floor of a hallway used by his tenant, no recovery can be had against him where it caused an injury to his tenant's wife, since it was necessary to establish that it had protruded for such a length of time as to charge him with constructive notice.—IDEL v. MITCHELL, N. Y., 52 N. E. Rep. 740.

65. LIFE ESTATES—Rights of Remainder-men.—Where the holder of a life estate in lands has sold part or all of them, the remainder-men cannot sue to recover the land sold until the life tenant's death.—SIMONTON v. WHITE, Tex., 49 S. W. Rep. 269.

66. LIFE INSURANCE—Application—Validity.—A contract for insurance, by which the underwriter, in consideration of the insurance, agrees to make a loan to insured, is not repugnant to Laws 23d Gen. Assem. ch. 33, § 1, prohibiting life insurance companies from discriminating between individuals of the same class and expectancy of life, and from making any contract not expressed in the policy, or giving any special inducement for insurance not specified in the policy.—KEY v. NATIONAL LIFE INS. CO., Iowa, 78 N. W. Rep. 68.

67. LIFE INSURANCE—Change of Beneficiaries.—Where plaintiffs based their right to recover on a policy in the name of defendant on the ground that assured had changed the beneficiaries, they are estopped from alleging in the same action that defendant was not the beneficiary, under a claim that they were entitled to the insurance as heirs of decedent's former wife, to whom the policy was payable prior to her death.—ANDERSON v. GROESBECK, Colo., 55 Pac. Rep. 1086.

68. LIFE INSURANCE—Insurable Interest.—Where an insurance company contracts with a person whose life is insured to pay the sum insured to another, it is unnecessary for such other, in an action on the policy, to show an insurable interest.—PRUDENTIAL INS. CO. OF AMERICA v. HUNN, Ind., 52 N. E. Rep. 772.

69. LIFE INSURANCE—Legal Heirs—Illegitimate Children.—An insurer is bound to pay to insured's illegitimate children their share under a certificate payable to "legal heirs," where insured had made them his legal heirs, under Code, § 3385, by recognizing them in writing, though he did not inform insurer of their existence, and insurer paid the amount of the policy to the legitimate children after having used diligence to find the legal heirs.—BROWN v. IOWA LEGION OF HONOR, Iowa, 78 N. W. Rep. 73.

70. LIFE INSURANCE POLICY—Assignment.—The defendant issued a policy of insurance on the life of the plaintiff, payable to himself in 20 years. Subsequently plaintiff assigned the policy to H, by a written assignment absolute in form, but in fact merely as security or indemnity for a loan which he agreed to procure for the plaintiff, but which he failed to do. H, however, remained in the possession of the policy, and subsequently assigned it to a bank as security for a loan, which he has never repaid. The bank made the loan relying on the absolute assignment from plaintiff to H, and believing, from an examination of it, that H was the owner of the policy, and without any knowledge that plaintiff had any claim to it, or of any equities between him and H. When the policy matured, the defendant paid it to the bank, but with notice of plaintiff's claim. From the time the policy was assigned to H until it matured, H paid the premiums on it, which plaintiff has never repaid. Held, that the bank took the assignment of the policy subject to the equities between plaintiff and H, and that plaintiff was not estopped, as to the bank, to assert his rights, by the fact that he had executed and delivered to H an assignment of the policy absolute in form.—BROWN v. EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES, Minn., 78 N. W. Rep. 103.

71. LIMITATIONS—New Promise.—To remove the bar of the statute of limitations, the acknowledgment or promise must be express, in writing, and signed by the party chargeable thereby. The acknowledgment must be in the writing itself, and cannot be read into it by means of oral testimony. Held, that the words of the defendant's testator which are relied upon are not in the letter, nor are any words having an equivalent meaning. The court cannot write them in.—JOHNSTON v. HUSSEY, Me., 42 Atl. Rep. 312.

72. MARRIED WOMAN—Principal or Surety.—A note executed by the only two *bona fide* stockholders of a corporation, one of whom was a married woman, for money used by the corporation, was an original undertaking, and not a contract to answer for the debt or default of another, within Ky. St. § 2127, providing that no part of a married woman's estate shall be subjected to the payment of any liability upon such a contract unless such estate shall have been set apart for that purpose.—WILLIAMS v. FARMERS' & DROVERS' BANK, Ky., 49 S. W. Rep. 183.

73. MASTER AND SERVANT — Assumption of Risk.—Though a brakeman knew, after he entered upon his employment, that it was customary to dump ashes on a track in a yard where trains were made up, he did not assume the risk occasioned thereby, so as to preclude him from recovering for injuries caused by his stepping on a clinker while coupling cars at night; the risk not being one which ordinary prudence would require him to refuse.—LOUISVILLE & N. R. CO. v. VESTAL, Ky., 49 S. W. Rep. 204.

74. MASTER AND SERVANT—Fellow-servants.—The rule that there can be no recovery of the master for injuries inflicted upon one of two co-equal fellow-servants, even by the gross negligence of the other, applies also to a statutory action for death by willful neglect.—EDMONSON v. KENTUCKY CENT. RY. CO., Ky., 49 S. W. Rep. 200.

75. MASTER AND SERVANT—Negligence—Assumption of Risk.—In an action brought by an administratrix to recover damages for the death of her intestate, alleged to have resulted from defendant's negligence while such intestate was in its employ, it is held that, on the evidence, the question of such negligence, and also that of the intestate's assumption of the risk, were for the jury.—LUND v. WOODWORTH, Minn., 78 N. W. Rep. 81.

76. MASTER AND SERVANT—Personal Injuries—Pleading.—A declaration in an action to recover for injuries received by a brakeman while uncoupling cars is not insufficient after verdict, as showing contributory negligence, merely because it shows the cars to have been in motion, without setting out facts making it necessary to so make the uncoupling, where the speed is not stated, and it is alleged that it was plaintiff's duty to uncouple the cars while they were being propelled over the line of road, and that he was in the exercise of due care for his own safety.—CLEVELAND, C., C. & ST. L. RY. CO. v. BAKER, U. S. C. C. of App., Seventh Circuit, 91 Fed. Rep. 224.

77. MINES—Ditches—Petition for Right of Way.—Comp. St. 1887, div. 5, § 1497, authorizing a mine owner to petition for a right to construct a ditch over another's claim if the right "shall not have been acquired by an agreement," requires the mine owner to make an unsuccessful attempt to come to an agreement before filing his petition.—GLASS v. BASIN MINING & CONCENTRATING CO., Mont., 55 Pac. Rep. 1047.

78. MINING CLAIM—Location—Survey—Mistake.—One who has located a claim, filed his notice, and procured a survey thereof by the United States deputy surveyor, as required by law, cannot be deprived of his property because the surveyor failed by mistake to include all that was covered by his location notice, where the mistake was cured by a resurvey, under the orders of the interior department, within a few days after the owner discovered it.—BASIN MINING & CONCENTRATING CO. v. WHITE, Mont., 55 Pac. Rep. 1049.

79. MORTGAGE BY WIFE — Payment of Husband's Debt.—Where a husband made to his wife a conveyance of land upon which he had previously executed a mortgage to a third person, and the wife, being thus clothed with the title, borrowed money, and gave her promissory note for the same, intending to use a portion thereof in paying off the incumbrance, which was in fact done, she could not, although the intention to pay off the incumbrance was known to the lender at the time the loan was made, defeat a recovery by the lender upon the note, either in whole or in part, upon the ground that it was given for her husband's debt, or for money with which to pay the same.—TAYLOR v. AMER. FREEHOLD LAND-MORT. CO. OF LONDON, Ga., 32 S. E. Rep. 153.

80. MUNICIPAL CORPORATIONS—Injunction—Receiver.—A bill to obtain a construction of a municipal charter, to determine whose duty it is thereunder to call and hold an election for officers, and incidentally asking for the appointment of a receiver to take charge of funds belonging to the municipality, and to enjoin the municipal officers from paying illegal claims,—no attempt being made to compel an election or to seek a forfeiture of the charter,—presents a purely abstract question.—HURLBUT v. TOWN OF LOOKOUT MOUNTAIN, Tenn., 49 S. W. Rep. 301.

81. MUNICIPAL CORPORATION—Licenses—Tax.—A city ordinance requiring every person who buys claims to pay a license tax, is unconstitutional in so far as it requires the payment of such a tax by persons buying claims only against the city.—BITZER v. THOMPSON, Ky., 49 S. W. Rep. 199.

82. MUNICIPAL CORPORATION—Licenses—Tax.—A city ordinance requiring the payment of a license tax by every person engaged in the business of contracting for public work is void in so far as it requires the payment of such a tax by contractors for street improvements, the tendency being to create a monopoly in the business of public works, and to increase the burden of abutting property owners, who are required to pay the cost of the improvements.—FIGG v. THOMPSON, Ky., 49 S. W. Rep. 202.

83. NEGLIGENCE—Defective Street—Street Railway.—In the absence of knowledge to the contrary, one driving over a street is entitled to presume that it is in a reasonably safe condition for travel.—CITIZENS' ST. R. CO. v. BALLARD, Ind., 52 N. E. Rep. 729.

84. NEGLIGENCE — Pleading.—A petition to recover for personal injuries received through the negligent and careless discharge of a revolver by defendant while exhibiting it to bystanders, must aver that plaintiff was without contributory negligence.—KLEINECK v. REIGER, Iowa, 78 N. W. Rep. 33.

85. PARTNERSHIP — Attachment.—Equity will not relieve against an attachment of firm property obtained on the collusive consent of a partner, since such consent does not affect the rights of the firm or the other partners, and they have an adequate remedy at law if the attachment be wrongful.—THAMES v. SCHLOSS, Ala., 24 South. Rep. 835.

86. PARTNERSHIP—Deed of Trust by Firm.—A deed of trust made for the benefit of partnership creditors, by one partner alone, is not for that reason invalid, where it appears that he had the entire management of the business, and there is no showing of fraud as to the other partner.—KELLER v. SMITH, Tex., 49 S. W. Rep. 263.

87. PRINCIPAL AND SURETY — Action.—Principal and surety on a bond may be sued in the same action, their liability accruing at the same time, and arising from one breach of the same contract.—WHEELER v. ROHRER, Ind., 52 N. E. Rep. 780.

88. PROCESS—Service on Foreign Corporations.—Code 1873, § 2585, authorizing a corporation having an office for the transaction of business in any county to be sued in such county with respect to any business growing out of or connected with the business of the agency, merely fixes the county in which suit may be brought, and does not define the manner of acquiring jurisdiction.—MOFFETT v. CHICAGO CHRONICLE CO., Iowa, 78 N. W. Rep. 45.

89. PROCESS — Service on Non-residents.—Service of summons upon a non-resident defendant can only be made in cases where service might be made by publication, and the failure to file the affidavit required before service by publication is as fatal, as a jurisdictional defect, with respect to personal service upon a non-resident, as with respect to service by publication; overruling a conflicting holding in Cheney v. Harding, 21 Neb. 68, 32 N. W. Rep. 64.—ROWE v. GRIFFITHS, Neb., 78 N. W. Rep. 20.

90. QUIETING TITLE—Pleading.—Under Acts 1892-93, p. 42, authorizing a person in the peaceable possession of land, claiming to own it (his title being disputed, but no suit pending to test its validity), to sue to settle the title, a bill cannot be maintained which fails to aver that no such suit is pending.—PARKER v. BOUTWELL, Ala., 24 South. Rep. 860.

91. RAILROAD COMPANY — Claims against Receiver.—Where materials for the repair of a railroad track furnished to the lessee were taken possession of and used in making such repairs by the receivers of the general system of which such line of road formed a part, the seller became a creditor of such receivers therefor; and they are not relieved from liability by the fact that they afterwards surrendered such line of road to a receiver appointed in another suit for that line singly.—CENTRAL OF GEORGIA RY. CO. v. HITCHCOCK, U. S. C. C. of App., Fifth Circuit, 91 Fed. Rep. 209.

92. RAILROAD COMPANY—Negligence—City Ordinance.—An ordinance prohibiting the obstruction of a street so as to delay any company carrying its apparatus to or from any fire does not make a railroad company liable for injuries received by a person in going to a fire in the performance of his duties while crossing a street which the railroad company had obstructed, unless the obstruction was such as to delay a fire company in carrying its apparatus to or from the fire.—SOUTHERN RY. CO. v. PRATHER, Ala., 24 South. Rep. 836.

93. RAILROAD COMPANY — Proximate Cause — Negligence.—A freight took a siding to allow a passenger train approaching from the front to pass. The switch was left unturned but the headlight on the engine was covered to indicate that the track was clear. Freights were required to carry in the cupola of the caboose a red light, which, when removed, indicated to an approaching train that the switch had been reset, but no light was carried on such freight. Trains in passing were to be in perfect control, so as to stop if signals were not right, and, had such light been displayed, the passenger would have stopped, and an accident resulting in the death of the engineer averted. Held, that the failure to provide the red light was the proximate cause of the injury.—DENVER, ETC. R. CO. v. SIPES, Colo., 55 Pac. Rep. 1093.

94. RAILROAD COMPANY—Receivership—Lien.—Where a railroad is in the hands of a receiver for administration as a trust fund for the payment of incumbrances, the court may declare a lien in favor of a claim, accruing shortly before the receiver's appointment, for cars furnished to the road, and necessary for its successful operation, prior in right to existing mortgages.—ST. LOUIS, ETC. R. CO. v. O'HARA, Ill., 52 N. E. Rep. 734.

95. RAILROAD COMPANY — Receivership—Priority of Liens.—Where the only property of an insolvent railroad company consists of a leasehold interest in a line of road extending into or through different States, and

the rolling stock used in operating the same, and creditors' suits are commenced in the federal courts in each of the different jurisdictions, and judgment creditors in the different States are, by the local statutes, given a priority of lien on certain of the property of the company, in the distribution of assets the proceeds of such property, either of rolling stock or leasehold or both, will be apportioned according to the mileage in each State, and the judgments therein given priority as to the respective portions.—THOMAS v. CINCINNATI, ETC. RY. CO., U. S. C. C., S. D. (Ohio), 91 Fed. Rep. 195.

96. RELIGIOUS SOCIETIES—Injunction.—A majority of a religious congregation, or the trustees thereof, will not, at the suit of a minority of such congregation, be enjoined from employing as pastor for the congregation a minister professing and teaching the same organic creed professed by the congregation, on the ground that such minister teaches certain doctrines and practices a certain church polity not taught and practiced by the minority, nor by the original founders of the congregation.—WEHMER v. FOKENGA, Neb., 78 N. W. Rep. 28.

97. SALES—Implied Warranty—Executory Contracts.—An executory contract to make and deliver an article implies an agreement that it shall be fitly made for the use contemplated by both parties.—NASHUA IRON & STEEL CO. v. BRUSH, U. S. C. C. of App., First Circuit, 91 Fed. Rep. 213.

98. SALES—Novation.—Plaintiff contracted to sell and deliver fruit to a firm. Previous to its delivery, the partners formed a corporation with other persons, which succeeded the business of the firm. The corporation received the fruit, and assumed the duties of the firm in relation thereto. Held not essential to plaintiff's right to recover the price that there should have been a formal novation of the corporation in the contract and a release of the firm from liability thereon; hence such novation and release need not be alleged.—MITROVICH v. FRESNO FRUIT PACKING CO., Cal., 55 Pac. Rep. 1064.

99. SEDUCTION—Witness—Impeachment.—In a prosecution for seduction, after a witness for defendant denied having sexual intercourse with prosecutrix, the evidence being of a negative character, and favorable to neither party, defendant could not impeach him by examining him as to contrary declarations.—PEOPLE v. GODWIN, Cal., 55 Pac. Rep. 1059.

100. STATUTES—Repeal.—Laws 1881, ch. 84, § 15, providing for the payment out of the State treasury of the costs and expenses of criminal prosecutions arising in unorganized counties, being valid when enacted, was not abrogated by the adoption of the State constitution, which prescribes a new method of making appropriations.—MORGAN v. STATE, S. Dak., 78 N. W. Rep. 19.

101. TAXATION—Valuation of Franchises.—Ky. St. §§ 4077, 4079, providing for the taxation of franchises of corporations, apply to all corporations, and are, therefore, not unconstitutional as making a discrimination. In valuing the franchise of a corporation for taxation, the indebtedness of the corporation and cost of operating its business are not to be deducted.—PADUCAH ST. RY. CO. v. MCCRACKEN COUNTY, Ky., 49 S. W. Rep. 178.

102. TAXATION OF PUBLIC PROPERTY—Exemption.—Under Const. Ky. § 170, providing that "public property used for public purposes" shall be exempt from taxation, the property of a city used in connection with its fire department, and also public parks of the city, are exempt from taxation by the State.—CITY OF OWENSBORO v. COMMONWEALTH, Ky., 49 S. W. Rep. 320.

103. TRESPASS.—Injunction does not lie to restrain the owner of property situate on plaintiff's land from removing it, where it does not appear that plaintiff will be unable to collect his damages, or that by removing it himself he can prevent the trouble, or that the harm is more than a purely technical trespass.—GATES v. JOHNSTON LUMBER CO., Mass., 52 N. E. Rep. 736.

104. TROVER — Judgment — Title.—A judgment for plaintiff in trover does not operate to transfer the title to defendant until satisfaction thereof.—JOHN A. TOLMAN CO. v. WAITE, Mich., 78 N. W. Rep. 124.

105. VENDOR AND PURCHASER—Contracts—Rescission.—A conveyance to one having actual knowledge of a contract of sale previously made does not entitle the vendee under the contract to rescind and recover back partial payments.—KREIBICH v. MARTZ, Mich., 78 N. W. Rep. 124.

106. VENDOR AND PURCHASER—Vendor's Lien—Fraud of Vendee.—A vendor has no lien for damages resulting from fraudulent misrepresentations as to the value of the property taken by him in payment for the land.—GRAHAM v. MOFFETT, Mich., 78 N. W. Rep. 132.

107. WAREHOUSE—Negligence.—A warehouse receipt issued by a warehouseman to his bailor, excepting the former from liability for loss from certain causes, construed, and held that the loss in this case did not result from any of the excepted causes.—HUNTER v. BALTIMORE PACKING & COLD STORAGE CO., Minn., 78 N. W. Rep. 11.

108. WATERS—Surface Water—Diversion.—Action will lie against a municipal corporation for collecting surface water in a channel, and pouring it on the land of another.—TOWN OF THORNTOWN v. FUGATE, Ind., 52 N. E. Rep. 763.

109. WILLS—Devise — Description of Land.—Where testator devised to S "the portion of land upon which she now lives, consisting of 145 acres," and devised to F "the remaining portion, consisting of 155 acres, being the portion upon which I now reside," S is entitled to 145 acres off of the end of the tract on which she lives, and F takes the remainder, though it contains more than 155 acres, as it is to be presumed that testator intended to dispose of all of his estate, and the general description is not to be limited by the subsequent particular description.—CUNDIFF v. SEATON, Ky., 49 S. W. Rep. 179.

110. WILLS—Survivorship.—Survivorship relates to death of testator, who, having but one child, devised his real estate to his wife so long as she remained a widow, and provided that "the above estate that is bequeathed to my wife shall be in full possession of my only daughter at the death or marriage of my wife, provided she shall be living, and, if she is not living, at the death or marriage of my wife, then the estate to go to the use of my brothers."—ASPY v. LEWIS, Ind., 52 N. E. Rep. 756.

111. WILLS — Vested Remainder.—Testator, by his will, devised to his son during his life, and at his death to his children, certain lands. Another clause of the will provided that, in case any of testator's children should die leaving no lineal descendants, their respective shares should be equally divided between "my surviving children and the lineal descendants of such as may be dead, the descendants to take such parts as their ancestors would have taken if alive." Of the devisee's children five survived. One had died without issue, leaving a widow, on whom he had settled the estate which he took under his grandfather's will, and one died during the life of his father, leaving a widow and five children. Held, that each of the grandchildren took a vested remainder of the land devised to their father for life.—WARING v. WARING, Va., 32 S. E. Rep. 150.

112. WITNESS — Attorney and Client — Confidential Communications.—An attorney who prepared papers for his client may testify as to the facts connected with their execution, such as whether the client was drunk, but not to the confidential reasons given for desiring their execution.—LANG v. INGALLS ZINC CO., Tenn., 49 S. W. Rep. 288.

113. WITNESSES—Impeachment.—Testimony as to a witness' reputation for honesty in the payment of debts is inadmissible to impeach his reputation for veracity.—CALKINS v. ANN ARBOR R. CO., Mich., 78 N. W. Rep. 129.